

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
CONTANT et al., : Docket #1:17-cv-03139-
 : LGS-SDA
 :
Plaintiffs, :
 :
- against - :
 :
BANK OF AMERICA CORPORATION et al., : New York, New York
 : December 16, 2019
 :
Defendants. :
 : TELEPHONE CONFERENCE
----- : ON MOTIONS

PROCEEDINGS BEFORE
THE HONORABLE JUDGE STEWART D. AARON,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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Proceedings conducted telephonically and recorded by
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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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HONORABLE STEWART D. AARON (THE COURT): Good morning. This is Magistrate Judge Aaron. This is the matter of Contant against Bank of America, 17-cv-3139. This line is being recorded. If I could have the parties identify themselves, please, starting with the plaintiff.

MR. MICHAEL DELL'ANGELO: Good morning, Michael Dell'Angelo from the law firm of Berger Montague on behalf of the plaintiffs. Accompanying me in the room are Michael Kane and Josh Ripley.

THE COURT: All right. Good morning.

MR. DELL'ANGELO: Good morning. Thank you.

MS. JULIA WEBB: Good morning, your Honor. This is Julia Webb from Locke Lord on behalf of HSBC.

THE COURT: Good morning.

Do we have counsel for FXCM on the line?

MS. JODI TESSER: Yes, your Honor. This is Jodi Tesser and Barry Temkin from Mound Cotton Wollan & Greengrass, counsel for FXCM.

THE COURT: Good morning.

MR. BARRY TEMKIN: Good morning, your Honor. This is Barry Temkin.

THE COURT: Good morning.

Do we have anyone else that is going to be joining on the line?

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MR. PATRICK MONTGOMERY: Good morning, your Honor.
This is Patrick Montgomery from King & Spalding on behalf of
Deutsche Bank.

THE COURT: Good morning.

MR. JEFFREY RESETARITS: Good morning, your Honor.
Jeffrey Resetarits of Shearman & Sterling for the Bank of
America defendants.

THE COURT: Good morning.

MS. TANZY WOAN: Good morning, your Honor. This is
Tansy Woan from Skadden, Arps on behalf of the JPMorgan
defendants.

THE COURT: Good morning.

MR. PHILIP SHAPIRO: Good morning, your Honor. This
is Philip Shapiro of Gibson, Dunn & Crutcher on behalf of the
UBS defendants.

THE COURT: Good morning.

Is that everyone?

MR. WILLIAM BUTLER: Good morning, your Honor. This
is Bill Butler from Moore & Van Allen on behalf of RBC Capital
Markets.

THE COURT: Good morning.

Anyone else?

All right. The purpose of this call is to discuss
the two pending letter motions filed at ECF 325 and ECF 335.

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The way I'd like to proceed, please, is I'll hear from the plaintiffs with respect to ECF 325; and then I'll hear from FXCM and then I'll hear from HSBC with respect to ECF 335 and I'll hear again from FXCM. And I may have a few questions along the way.

I've obviously read everything that's been submitted. Please feel free to just rest on your papers or just to refer me to specific things rather than rehashing what's in the correspondence. But I did want to give the parties an opportunity to address any issues that they thought were particularly relevant for me to consider as I rule on these two letter motions.

MR. DELL'ANGELO: Thank you, your Honor. Again, this is Michael Dell'Angelo on behalf of the plaintiffs. In light of how narrow the dispute is and your statements introducing the dispute, I will attempt to be very brief and just respectfully reserve the opportunity to respond as needed.

From the plaintiffs' perspective the dispute is really very limited. You know, we have requested and through the meet-and-confer process narrowed down the scope of material from FXCM that we believe is really necessary and relevant to our case, both to (indiscernible) impact of damages as well as to provide notice for four settlements that

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we made with defendants in the case. And, you know, there are a number of additional defendants against whom we're still litigating. And so the dispute is really narrowed to the question of whether and to what extent legal fees should be paid. And in that regard I think we have set it out, you know, fairly clearly in our papers. It's really a question of compliance, which is not reimbursable, and we have to this day not had any substantiation as to what, if any, fees have actually been incurred, as to whether they're compliance- or noncompliance-related.

And just to briefly overview the dispute with respect to expenses, initially because a lot of the material that we understood HSBC's subpoena was seeking would overlap with what plaintiffs were seeking, we had thought that it made sense, to the extent that FXCM was insisting upon some extended contribution from the parties, that each of the parties just share that expense equally. You know, again, FXCM didn't substantiate which expenses, and the basis for its estimate was set forth in a letter to the Court of, I believe, December 6. That said, because an agreement apparently couldn't be reached with HSBC with respect to the scope of its subpoena to FXCM, plaintiffs suggested that we just pay half of what FXCM was proposing, even though it's not really clear in our view that any contribution is required. Because of how

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important this information is both to the prosecution as well as providing notice to the class for the settlements, we wanted to facilitate that and, you know, effectively took on word what FXCM was representing about the expenses. And beyond that, I'm happy to answer any questions that the Court has; but, otherwise, the interests of (indiscernible) and the narrowness of the dispute, just rest on our papers.

THE COURT: All right, so with respect to the data that the plaintiffs are going to be receiving under the plaintiffs' subpoena, I saw what's Exhibit 3 to the letter that was submitted by Mr. Temkin of December 12, which is an email from Jodi Tesser to Julie Webb that has -- it says, "Please find attached the exemplar we provided to plaintiffs' counsel." So this appear to the Court -- and I'd like just confirmation as to -- are you receiving, for lack of a better term, FX trading data in response to plaintiffs' subpoena?

MR. DELL'ANGELO: Yes, your Honor, that was -- yes.

THE COURT: And what else are you receiving in addition to what I refer to as the trading data?

MR. DELL'ANGELO: So there are a number of things that relate to data how FXCM interacts with its customers and processes transactions, which are really central to the determination in our case, as well as customer-specific information about addresses. We have an indirect-purchaser

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case on behalf of plaintiffs in eight states, so we're seeking contact information for plaintiffs in those eight states so that we can issue notice and do a damage analysis that's limited to the plaintiffs who have brought claims in this case. So broadly those are the categories of what we've narrowed the subpoena to.

THE COURT: Okay. And I'm obviously going to be asking this question of HSBC, but I'll ask it of you, as well. What's the overlap between your subpoena and the HSBC subpoena, from your perspective?

MR. DELL'ANGELO: I would say, your Honor, the overlap of what we have requested -- let me put it this way. I think everything that we have requested is within, broadly within the scope of the HSBC subpoena, although the HSBC subpoena is somewhat broader. I'm a little hesitant to kind of define the parameters of the HSBC subpoena in part because I don't -- you know, I'm not the driver that's been thinking about subpoena, and there may have been some, you know, narrowing or discussions between HSBC and FXCM.

THE COURT: Okay. Very well. So those are the only questions I had.

Who's going to speak on behalf of FXCM?

MR. TEMKIN: Good morning, your Honor. This is Barry Temkin. I'm going to speak on behalf of the

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2 negotiations with the plaintiffs. And my colleague, Jodi
3 Tesser, will speak on behalf of negotiations with defendants.

4 THE COURT: Okay. Yes, Mr. Temkin, so what I'd
5 like to do, as I mentioned, I'd like to speak strictly about
6 the plaintiffs' subpoena for now. So let me hear from you.
7 And then I'd like to give HSBC an opportunity to speak before
8 your colleague speaks.

9 MR. TEMKIN: Yes. You got it. That's fine.

10 Judge, I just want to make it clear that, you know,
11 pursuant to the Court's rules and chambers individual rules,
12 that what we're doing now is really just a conference on the
13 Rule 45 potential motion.

14 THE COURT: Let me stop you. Let me stop you. I'm
15 deciding this motion today. You'll be getting a written
16 order, so say whatever you want to say. I've gotten a lot of
17 materials. So this is your chance.

18 MR. TEMKIN: Okay, but, your Honor -- I'm going to
19 proceed -- but my concern is, you know, we haven't had an
20 opportunity to submit a declaration or any documents other
21 than the three pages required by the Court's rule. So, in
22 other words, I've just heard from plaintiffs' lawyer, with
23 whom we have a substantive agreement in principle about the
24 scope of what to produce; but I just heard him say, well, you
25 know, Mound Cotton hasn't produced its billing records. But

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2 under this Court's rules I would not have had an opposition to
3 produce, for example, our billing records or a declaration
4 from our clients because the Court's rules only permit us to
5 file a three-page letter.

6 So I'm just asking that we be allowed to continue
7 discussions, and then if it's germane to the Court's rulings,
8 we be permitted at a future time to submit billing records,
9 because our billing records for six months of meet-and-confer
10 and reviewing documents and drafting a declaration are, you
11 know, substantially more than three pages, your Honor.

12 THE COURT: Okay.

13 MR. TEMKIN: And it's just not fair to limit us to
14 three pages and then say we won't have an opportunity to put
15 in any declaration.

16 THE COURT: Okay. So, again, let me stop you. You
17 submitted more than three pages because I asked you for
18 additional briefing, and you submitted another letter. In
19 fact, you submitted three letters to the Court with
20 attachments. Having said that, to the extent that the Court
21 believes that your billing records are germane to this
22 dispute, you are certainly going to have the opposition to
23 submit billing records at the appropriate time. Don't get me
24 wrong. I'm not going to be prejudicing you in any way from
25 putting in the proof that you need to establish what you're

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2 trying to establish.

3 MR. TEMKIN: That's fine, your Honor. I
4 appreciate -- I just wanted to clarify that. And the same
5 thing, we may ask the Court -- and we may not need to -- but
6 we may ask the Court for an opportunity to put in a
7 declaration from our client on the level of burden.

8 But for the plaintiffs I don't think we need to do
9 that, your Honor, because, you know, I'm happy to say that
10 we've met and conferred with the plaintiffs for months, many,
11 many meetings. We have reached an agreement, we confirmed it
12 in a letter. And we also, as counsel correctly points out,
13 the only real legal issue as to the plaintiffs is who pays
14 what. And we're happy to continue cooperating.

15 Both sides agree that we think all the case law
16 cited by both sides provides that a non-party served with a
17 subpoena under Rule 45 is entitled to some compensation for
18 legal expenses. I've seen no case that awarded 100% of the
19 non-party's legal fees. I've seen it range from a third in
20 the case of *First American against Price Waterhouse* to as high
21 as 80% in *Kahn against GM*. And, obviously, the Court is
22 looking at all the factors. Neither side has cited a case in
23 which zero in legal fees was paid. Here we're in a situation
24 where the plaintiffs, as Ms. Tesser will get into later, the
25 defendant have not agreed to pay dollar one. As we said in

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our letters to the Court, we've incurred over \$50,000 in legal fees doing what the court rules require us to do; we're meeting and conferring, we're attempting in good faith to produce the records, and we've -- you know, we've reviewed -- we've been back and forth with our client. We've prepared a detailed declaration from our client, which we've shared with everyone on the phone, with both sides. And we're actually happy to go back and continue this discussion, but no one's agreeing to pay our legal fees, and so we think we're entitled to at least, you know, to have our legal fees paid. Whether it's 100% or 0% or some number in between, we think we're entitled to that, and certainly we shouldn't be penalized for doing what the court rules tell us to do, which is meet and confer in good faith.

THE COURT: Okay. Anything else to add vis-à-vis the plaintiffs?

MS. TESSER: Your Honor, hi, this is Jodi Tesser for FXCM. I just wanted to point out one additional piece of information. The plaintiffs' counsel is taking issue with the fact that we're looking for what they term as pre-production legal fees. And they've cited cases in support of that where the counsel for the subpoenaed entity is incurring fees in resisting the subpoena as opposed to attempting to comply with the subpoena. And what we've been doing, as

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Mr. Temkin has just, you know, provided to the Court in terms of recitation of our back-and-forth, we've been doing meet-and-confers for months. We have discussed the scope of the subpoena with plaintiffs' counsel on numerous occasions. We have agreed to produce documents in response to certain demands. We have -- plaintiffs have agreed to withdraw certain demands, and for other more sensitive proprietary and confidential information we have agreed to produce and we have produced to everyone, as Mr. Temkin said, a 17-page draft declaration that touches upon those proprietary and confidential demands in both subpoenas.

So it's our position that this back-and-forth with plaintiffs' counsel is not in attempting to resist the subpoena and is in fact an attempt to comply with the subpoena. The cases that discuss resisting subpoenas talk about fees incurred in connection with doing research on attorney-client privilege and other confidential privileges to attempt to hide documentation behind those privileges and/or research about clock-shifting. That's not what we're seeking attorneys' fees for. We are seeking attorneys' fees for the meet-and-confers concerning the narrowing of the scope of the subpoena in order to comply with it and also in drafting that 17-page declaration with our clients.

THE COURT: Okay. Anything else?

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2 All right, let me hear, then, from HSBC.

3 MS. WEBB: Good morning, your Honor. This is Julie
4 Webb from Locke Lord on behalf of HSBC. Given your comments
5 about how thoroughly you've read the papers, I'm not going to
6 take too much of your time, but I'm happy to answer questions
7 you may have. I do just want to say that it's clear to us
8 from plaintiffs' filings that a substantial portion of the
9 data that it will be receiving from FXCM is for the purpose of
10 administering some settlements. We certainly don't think
11 that HSBC should be required to pay for data plans they're
12 receiving to administer settlements. I also --

13 THE COURT: All right, so let's -- stop, please.
14 Let's go better on that. I have your subpoena. You're asking
15 for trading data, aren't you?

16 MS. WEBB: I am asking for trader data, you're
17 right.

18 THE COURT: Okay. So tell me what parts of what
19 plaintiff is getting is different from that which you need and
20 which you've requested.

21 MS. WEBB: We don't have enough information
22 about -- I'm sorry, I didn't mean to interrupt, your Honor.

23 THE COURT: Okay. It --

24 MS. WEBB: We don't have enough -- we don't --

25 THE COURT: Go ahead.

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2 MS. WEBB: From HSBC's perspective, we do not have
3 enough information about the data that FXCM is going to be
4 producing to plaintiffs in order to say either way whether it
5 would be appropriate for us to pay for it. We have received
6 that one exemplar. We can't tell from the exemplar whether
7 it's retail-side data, liquidity-side data, what the scope of
8 the data pull might be. We've asked the follow-up questions,
9 and we've not received answers. So --

10 THE COURT: Okay. So let's stop --

11 MS. WEBB: -- we are not --

12 THE COURT: Let's stop. Let's stop. Let's stop.
13 Let's go one at a time. And I want plaintiff to answer the
14 questions as to what's there. So go with your first category
15 that you don't know. You listed a bunch of things you don't
16 know --

17 MS. WEBB: We don't have anything --

18 THE COURT: You gave a bunch --

19 MS. WEBB: And so I guess --

20 THE COURT: You gave a bunch of examples. I want
21 to go one by one, and I'm going to have the plaintiff tell you
22 whether or not it's there. So go ahead.

23 MS. WEBB: Okay, my first question is will the data
24 include both retail side and liquidity side or only one or
25 only the other or something I'm not even thinking of?

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2 MR. DELL'ANGELO: This is Michael Dell'Angelo
3 speaking for the plaintiffs. My understanding is that it's
4 both.

5 THE COURT: And counsel for FXCM, is that right?

6 MS. TESSER: Yes, I believe so, your Honor.

7 THE COURT: Okay, what's your next question?

8 MS. WEBB: What is the time frame for which data is
9 being pulled?

10 MR. DELL'ANGELO: My understanding is it's the
11 beginning of 2007 through 2015, December 2015; so two years
12 after the flat period.

13 MS. WEBB: And for what -- what customers, what
14 types of transactions are being pulled? Like, you must be
15 doing some sort of limiting searching, right? So unless it's
16 all of FXCM's data for that time period --

17 MR. DELL'ANGELO: As I indicated before, the
18 transactions are for those in the eight states that are the
19 subject of the complaint and that they're spot transactions.

20 MS. WEBB: Okay, so it's only spot transactions,
21 correct?

22 MR. DELL'ANGELO: Well, yes, it's my -- yes.

23 MS. WEBB: And it's only spot transactions that are
24 somehow connected to the eight states identified in the
25 complaint?

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2 MR. DELL'ANGELO: Correct.

3 MS. WEBB: Do we know how the location is being
4 determined? Is there actually a location field that's pulled?

5 MR. DELL'ANGELO: Um --

6 MS. WEBB: I didn't see one on the exemplar; that's
7 why I'm asking.

8 MR. DELL'ANGELO: Yeah, we had some discussions
9 with FXCM about this. Just in the interest of making sure we
10 get the answer right, I would ask if counsel for FXCM could
11 specify? Perhaps you could add some color here?

12 MR. TEMKIN: Okay. This is Temkin. What
13 specifically is the question?

14 MR. DELL'ANGELO: My understanding is counsel for
15 HSBC is trying to confirm how it is that FXCM is determining
16 the location of those making the spot transactions from 2007
17 to 2015 for which you would be producing in response to
18 plaintiffs' subpoena.

19 MR. TEMKIN: Right. I mean, we -- this is
20 Temkin -- we have a database where we can search by, yeah, by
21 address, by state. But we have -- but it's not, especially if
22 you want to go back eight years, you know, we're going to have
23 to do some work and do some scanning to reconstruct it. And
24 for different time periods it's kept in different statuses.
25 So, in other words, it's going to take a lot of legwork to, or

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2 finger work, to get to the point. But we can isolate this;
3 it's just going to take time.

4 MS. WEBB: This is Julie Webb. Mr. Temkin, is there
5 a location field you're able to include in the production?

6 MR. TEMKIN: We would have to do a search to locate
7 that; but the answer is yeah, we can search by location, but
8 it will take -- you know, it will take effort and time. And
9 going back eight years will take a lot longer than going back
10 five years because my -- what I'm told from FXCM is that, you
11 know, it's databases have changed over time and, you know,
12 over the last -- especially going back that long, five years,
13 it's kept, I think, on backup tapes that needs to be restored,
14 and there's other data mixed in with it. So we can't just
15 pull addresses with the push of a button the way -- you know,
16 that easily.

17 MS. WEBB: Okay, so it's my understanding that when
18 you say you're going to search by location or state, what you
19 would be searching for is the customer's address information
20 in your systems, correct?

21 MR. TEMKIN: Correct.

22 MS. WEBB: Okay, and this is something you're
23 already planning to do for the production to plaintiffs; it's
24 not something extra that I'm identifying for you because I'm
25 being told you're already planning to pull for just eight

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states, correct?

MS. TESSER: Yeah, so -- yeah, so Julie and your Honor, I find multiple conversations with, I believe, Ms. Webb about this. I sent to her a June 17, 2019, letter which identifies the requests in the plaintiffs' subpoena, which is exactly what we're doing now, telling her -- advising her what categories of documents FXCM is going to be responding to. For example, in the June 17, 2019, letter, you say, "Requests 3 and 4, we agree to produce this information for the defendant banks only for the eight states involved in the case." So if Ms. Webb was asked to look at the subpoena -- since the subpoena, she would know that we agreed to produce all of the items listed in the Request No. 4 in accordance with the letter. This is exactly what I've been trying to say during our meet-and-confers. This documentation, you know, the questions that I think defendants' counsel has have already been addressed numerous times during our meet-and-confers.

MS. WEBB: May I respond, your Honor?

THE COURT: Yes.

MS. WEBB: Respectfully, Ms. Tesser, I've asked many times some follow-up questions, and today is the first time I'm getting answers, and they're from plaintiffs' counsel. So, you know, I didn't know it was both liquidity side and

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2 retail side that you'd be producing, and I didn't -- I've been
3 asking how you were going to be limited it by location. And I
4 was told by you that was an improper interrogatory, so I
5 couldn't have that information. So I need information about
6 what is in this production in order to determine whether or
7 not it's something that my client is willing to pay for. So
8 we're not saying no, we'll never pay; we're saying please tell
9 us more. And today I'm getting some more information. That's
10 very helpful.

11 THE COURT: Yes, so just to be clear -- this is the
12 judge -- I'm going to be ordering you to make some payments.
13 So you don't need to worry about making an agreement, okay?
14 But whatever categories you have so far, everything that
15 you're -- as I understand it -- you'll correct me if I'm
16 wrong -- but this is all overlap with your subpoena?

17 MS. WEBB: Yes, your Honor, this is all overlap with
18 our subpoena.

19 THE COURT: Okay.

20 MS. TESSER: It's my understanding that --
21 regardless, okay.

22 THE COURT: Okay?

23 MS. TESSER: I also have -- I have a few more
24 questions about the damages if this is the time for me to ask
25 them.

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2 THE COURT: Yes. I mean, obviously, this should
3 have happened before, but now is as good a time as any.

4 MS. TESSER: Oh, I've been asking them, your Honor;
5 I just haven't received answers, but I'm receiving answers
6 today so I'd like to keep asking them, if that's okay.

7 THE COURT: Yes. And I take -- the Court takes no
8 position because the Court doesn't know, aside from the
9 letters it's been given, as to who said what to who. But go
10 ahead.

11 MS. TESSER: Okay. For the liquidity-side data, the
12 letter says that, "FXCM will be producing it for the
13 defendant banks only." And I'm not able to determine what
14 that means. Is that meaning that FXCM will only be producing
15 liquidity-side data that involves a transaction between FXCM
16 and a defendant?

17 MS. WEBB: Yes, that's exactly what it means. For
18 the defendants that are involved in the underlying
19 litigation, yes, that's exactly what that means.

20 MS. TESSER: Okay. And it's only -- okay. That
21 helps. Thank you.

22 Okay. If any other defendants' counsel on the
23 phone have additional questions about the data; that's what I
24 have in my list right now.

25 MR. RESETARITS: Yeah, this is Jeffrey Resetarits

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with Shearman & Sterling for Bank of America. I frankly don't understand the last interaction that just occurred. The way these transactions work is the retail customers trade with FXCM, and FXCM then goes into the market and does a corresponding trade with potentially the defendant banks, potentially other entities. And so the limitation to just the defendant banks doesn't make any sense in this context.

MR. TEMKIN: This is Barry Temkin. I'm not sure I understand the question, actually.

MR. RESETARITS: It's straightforward. The retail customers that trade with your client, they enter into a transaction. Your client then goes into the market and trains with other liquidity providers. Sometimes those liquidity providers are the defendant banks, and sometimes they are not. And so it's critically important for this case to get both the transactions with the defendant banks and the non-defendant banks. They're central to this case. I don't know how you can limit it to that.

MR. TEMKIN: This is Barry Temkin. So I agree that sometimes FXCM transacts with the defendant banks and sometimes it transacts with other non-defendant parties. But it would be substantially more burdensome on FXCM to produce additional documents and search for additional documents with parties that are not -- with banks that are not parties to

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this case. And I'm not sure -- no one's explained to me why documents of banks that are not parties in this case would be relevant to this case, and no one's offered to pay us to do that search.

MR. RESETARITS: It's no -- there's no additional burden. This is a collection of data; this is not a search for paper documents and files. This is -- when you search on the liquidity side, you either gather it all or you gather part of it. It's actually more work to limit it to the defendant banks. That takes effort.

MR. TEMKIN: Your Honor, this is Barry Temkin. I haven't really heard anything from Bank of America. We've been meeting and conferring with the defendants and the plaintiffs for about six months now, and this is the first I've heard that -- you know, of this request. But all I can tell you is, you know, Ms. Tesser and I have been speaking to our client, meeting with our client and emailing with our client for six months now. And they're representing to us, and we'll be happy to put it in a declaration, that it would be significantly more burdensome and expensive for FXCM to produce databases, which have to be -- you know, they have to be retrieved, most of them, from backup tapes and other storage. And our client's data, according to what they've told us, is intermingled with other data. Like, it's mixed up

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with other documents, so it has to be untangled from the other documents. And so my client's challenge could be very, very burdensome. And as your Honor just heard with your own ears, when I just asked counsel for Bank of America what relevance does it have, he just said, "Well, it's not going to cost you any more money to find it." And my client says it will.

MR. RESETARITS: With all due respect, I'm happy to explain to you what the relevance is. The relevance is that the transaction -- the plaintiffs allege that the defendants engaged in back-to-back transactions. So the retail customer traded with FXCM and then did a back-to-back transaction with the defendant bank at the exact same rates. The defendants have a whole host of arguments, one of which is that the back-to-back transaction was not with the defendant bank; it was with a third party who had nothing to do with any anti-trust conspiracy. So getting the data for those non-parties is critical. We -- there's no way that the defendants want any part of paying for data that doesn't have the complete picture of the back-to-back transactions. It's really that simple.

MS. TESSER: Well, with all due respect, the representation that it should be pretty easy for our clients to gather the additional liquidity provider information for non-party defendants is not accurate. We discussed this. As Barry said, we discussed it with our clients, with multiple

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2 preparation of multiple queries, as the data is stored
3 differently for different years over the eight-year time
4 period, restoration of backup tapes, isolation of relevant
5 data, cleaning of the data to ensure that a single query will
6 produce the desired results across the entire database,
7 linking the data together from FXCM's various databases in
8 order to produce the requested information and searching the
9 voluminous documents. So, I mean, that's directly from our
10 client as to a summation as to the process that it would take
11 just to get the information related to the eight defendant
12 banks.

13 MR. TEMKIN: As William F. Buckley famously said,
14 counsel's argument reminds me of calling 17 witnesses who did
15 not see the defendant shoot the victim. In other words, you
16 know, defendants are accused, and some of them have pleaded
17 guilty to, or agree with regulators that they were engaged in
18 anti-competitive price fixing, forcing a non-party, at great
19 additional expense, to produce records about non-
20 conspiratorial trades with people who haven't been accused of
21 price fixing seems an unwarranted burden, particularly where
22 here Bank of America has not been part of this party for the
23 six months that we've been incurring over \$50,000 in legal
24 fees, meeting and conferring with everyone else.

25 MR. RESETARITS: I frankly don't understand that

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argument at all. I have no doubt that it is difficult for you to gather this information. That burden exists regardless of whether you limit it to the defendant banks or you include the other liquidity providers. And in fact anybody who has searched through a detailed spreadsheet knows it's actually harder to exclude and to limit certain categories rather than just to produce the whole thing.

THE COURT: Yes. What the Court is having difficulty understanding from FXCM is it seems to the Court that there's trading data that relates to these FX instruments, and it would seem to the Court that what counsel for Bank of America is saying makes sense, right, that in order to pinpoint that which related to the defendants in this case would require more work than just giving all of the data. Tell me what I'm missing.

MR. TEMKIN: Your Honor, since -- this is Temkin -- since this is just raised for the first time in this call, I would ask an opportunity to go back to my client to, you know, who has a unique system, to explain carefully to the Court what I'm just hearing for the first time today. And, you know, we reached an agreement with the plaintiff in June -- okay, that's six months ago. We sent that over to counsel for HSBC, whom I assume shared with the other defendants. And now six months later, you know, counsel for Bank of America is

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2 saying, Hey, it's not going to cost you anything more. So
3 rather than, you know, cause FXCM to be blindsided by the
4 surprise last-minute argument, all I'm asking for is an
5 opportunity for me to go back to my client and explain to the
6 Court in writing exactly why, as he's told me many times, it's
7 much, much more burdensome because of the way we keep the
8 data. And, you know, restricting it to these defendants is
9 very beneficial and cheaper to my client. I'm just a lawyer;
10 I'm not an IT professional, but that's what the IT
11 professionals are telling me.

12 And, you know, maybe counsel for Bank of America has
13 dealt with different spreadsheets for different clients; maybe
14 that's the way Bank of America keeps its records. But, your
15 Honor, it's been represented to me that ain't the way that
16 FXCM keeps its records. And, you know, if you don't accept my
17 representation, then give me a chance to put in a declaration
18 for my client, and I'm pretty sure we'll satisfy the Court
19 because, you know, all the information they've been giving us
20 so far and that we've shared with both sides has been accurate
21 in good faith.

22 THE COURT: All right, let me ask plaintiffs'
23 counsel, why is it that you don't want transaction data
24 relating to parties other than the defendants? I'm having
25 difficulty understanding.

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2 MR. DELL'ANGELO: Well, your Honor -- this is
3 Michael Dell'Angelo speaking -- we don't believe that we need
4 it. The allegations in the case are that the defendants
5 conspired to, for example, widen the spread on FX
6 transactions that they made with retail foreign exchange
7 dealers, such as FXCM, and then FXCM then passed on that
8 illegal overcharge to our clients. And we believe that by
9 getting that narrower set of defendant transactional data
10 between FXM and the defendants and between FXCM and our
11 clients we can trace what we need to trace. The defendants
12 have a different view, as I understand it, of the scope of the
13 data that they want. That really goes to how they, you know,
14 intend to defend the case; it doesn't go to how, you know, we
15 intend to prosecute the case.

16 THE COURT: All right, so here's what I'm going to
17 do. I don't want additional submissions to the Court with the
18 back-and-forth and the back-and-forth that happened here. I
19 believe that HSBC -- well, let me ask you this: Since we had
20 all these other defendants join the call -- and this is the
21 question I had earlier -- am I correct that this data is going
22 to inure to the benefit of all of the defendants in the case?

23 MR. DELL'ANGELO: Yes, your Honor.

24 THE COURT: And am I also correct that whatever
25 cost sharing the Court's going to allocate here -- and there

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2 will be some, because I agree with Mr. Temkin that under the
3 case law and under the rules, that some cost sharing is
4 appropriate -- that whatever share goes to HSBC is going to be
5 shared among the various defendants?

6 MS. WEBB: That's our hope, your Honor.

7 THE COURT: Well, is it -- it's something more than
8 hope, isn't it? I mean, you folks have a joint defense
9 arrangement, I imagine, such that it's not only going to fall
10 on one of you, unless you've divvied it up, and HSBC takes the
11 expense on this one, and then Bank of America takes the
12 expense on the next one. There is going to be sharing, isn't
13 there?

14 MS. WEBB: We expect there to be sharing, yes.

15 THE COURT: Okay. So I think this meeting-and-
16 conferring already should have happened, and I know people
17 point fingers as to whose responsibility it was that it didn't
18 happen, but that's all water under the bridge. I am going to
19 direct that defense counsel (indiscernible) meet and confer
20 with FXCM with respect to this issue of what I'll refer to as
21 the additional trading data. And what I want to understand in
22 a joint letter -- and hopefully you're going to work it out --
23 is whether there is incremental costs associated with this
24 trading data that captures all of the trades, not just the
25 trades where the defendants, you know, provided the

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2 liquidity, but rather, the trades (indiscernible). And I'd
3 like to understand what the scope of that incremental expense
4 is so I can figure out how to divvy it up between plaintiffs
5 and defendants. I understand what plaintiffs are saying, in
6 order to prove our case we only want this. But that's not
7 fair to the defendants because they obviously need the
8 broader data pull in order to prove their defense. But I'd
9 like to understand what the incremental cost is so I can
10 figure out how to properly allocate it. How long do you folks
11 need, given that we're approaching Christmas week, to
12 accomplish that meeting-and-conferring and reporting back to
13 the Court?

14 MR. TEMKIN: Your Honor, I'm going to be out of the
15 office for about two weeks, so I would ask for a date in
16 January.

17 THE COURT: I take it Ms. Tesser is similarly
18 unavailable?

19 MS. TESSER: Yes, your Honor, I'm here this week,
20 but I am gone from next week through the new year. And,
21 again, we have to speak to our client. You know, I don't know
22 what they're going to do, what their vacation schedule looks
23 like at this point. We did not talk to them about that before
24 this call.

25 THE COURT: And tell me what the deadlines you have

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in the case are.

MR. DELL'ANGELO: Your Honor, this is Michael Dell'Angelo. May I speak to that? I wasn't quite clear who you were directing that to, but --

THE COURT: I was directing it to whoever could answer the question.

MR. DELL'ANGELO: Thank you. So by consent, plaintiffs and defendants just recently asked Judge Schofield for an extension of the dispositive motion and class certification deadlines as well as the fact discovery deadlines. So they're now pushed out to the end of the first quarter of this year. So we are kind of approaching what is already an extended deadline.

But the thing that I would like to just draw to the Court's attention and one area where I would ask some indulgence to the extent that it's feasible within the scope of what your Honor has in mind about how to manage this process is that we have had preliminary approval pending on two settlements. On January 6, I believe it is, we have a preliminary approval hearing on two more settlements. Now, in the interest of full disclosure, we told the Court that we would like to combine notice for those two settlements because we need to get address data from the various RFED's, such as FXCM. There are others on whom we're waiting, so I don't mean

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to suggest that this is a problem that FXCM has created. But the more quickly we can get at least the address information, the more quickly we, you know, fulfill our obligations to issue notice. So I would just -- I just wanted to raise that issue because this is one of several pieces, certainly not the only one, that is holding up our ability to, you know, issue notice and fulfill our obligations with respect to the preliminary approval process. So from our perspective, the sooner we can at least get that contact information, the better.

But the other thing I would say is this larger transactional data the parties are trying to get is absolutely critical to plaintiffs' ability to brief class certification. That deadline was coming up in December, was effectively, you know, impossible to meet in light of not having this data from FXCM as well as others. So, again, I'm not putting it at their feet alone. And this was obviously a complicated, you know, three-way negotiation. But, you know, what I would prefer not to do is have to go back into court and ask for yet another extension on the class certification deadline, although depending on when the parties get the deadline -- get the data, we may be forced to do that.

THE COURT: All right, and so --

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MR. TEMKIN: This is Temkin --

THE COURT: Yes, let me -- Mr. Temkin, let me speak, please.

Thank you for adding additional issues for me to address. So we're going to break them down. So the list of names, is that list of names and addresses, is that of use to the bank defendants here?

That question's addressed to HSBC or any other of the banks on the call.

MS. WEBB: I think the only interest to defendants would be to the extent that plaintiffs are trying to prove that a customer or a trade occurred in a certain state. You know, that's the only use of the address that I can think of. So I don't know that defendants would be independently inclined to pay for that.

MR. TEMKIN: Well, I just would -- well, your Honor, if I may, a significant issue in the case that the defendants have raised is that the plaintiffs have to be -- first of all, they have to be from a particular state to even have standing to bring a claim. And with respect to some of the states, I think it's the defendants' position that they actually had to transact from that state. So, for example, in the five or six plaintiff depositions that we've had thus far, I mean, a theme of the questioning has been do

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2 you go on vacation, do you travel for work, do you transact
3 FX when you're outside of your home state. So I tend to
4 think that that location data, while the defendants may not
5 have an interest in it for purposes of class certification
6 notice under Rule 23, they will have a significant interest
7 in it from a defense of a class certification motion as well
8 as potential standing issues.

9 MS. WEBB: So maybe I misunderstood. I thought we
10 were talking about the addresses, not a location field. I'm
11 not sure we need the full address. And it sounds to me like
12 plaintiffs would like full address information. To the
13 extent pulling complete address information for FXCM's
14 customers is a different process than just pulling a field,
15 a location field in the database, that's what I was saying
16 we probably wouldn't be interested in.

17 MR. DELL'ANGELO: I understand. I guess only --
18 this is Mr. Dell'Angelo speaking -- I can only -- I think
19 only FXCM can speak to that question. It wasn't clear to me
20 from the discussion earlier as to whether or not there's
21 really a distinction, but we've got --

22 MS. WEBB: Understood.

23 THE COURT: All right. So FXCM, how -- can you
24 get the address and location data separately and on a
25 different, for lack of a better term, on a different

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schedule than the trading data?

MR. TEMKIN: Your Honor, this is Barry Temkin. My understanding is no; it's all intertwined, and it would take at least a month and probably more.

THE COURT: Okay.

MR. DELL'ANGELO: Your Honor, this is Michael Dell'Angelo. May I just ask a related question that may sort of cut through some of this? I'm not trying to sort of create a complication, but to the extent that there are ongoing issues for data pulls, for scoping issues for the defendants and FXCM, I'm wondering if it would be -- since the plaintiffs had an agreement on the scope of the subpoena, and I think the only question is, you know, the question of fees and costs -- we'll be bound by, you know, whatever the Court decides on that -- as to whether or not it would be possible to at least, you know, move the scope of the plaintiffs' agreement forward just to keep the timeline moving?

THE COURT: Yes. I mean, the problem that I see with that -- and, obviously, I'm (indiscernible) from FXCM is you do the data pull once. It's far more expensive to do it twice. And unless the plaintiff is willing to pay, for lack of a better term, on its own for its data pull and then the defendants pay on their own for their data pull whatever

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share it is that I determine in my discretion, if you're willing to do that, then I don't see an issue. But FXCM is going to be put to a greater burden if they have to do two data pulls.

MR. DELL'ANGELO: I understand, your Honor. I appreciate that. We would prefer to be more efficient, certainly don't want to incur costs that are unnecessary to incur. What I had had in mind is, from what I understand what Mr. Temkin was saying, is that pulling the non-defendant transactional data that Mr. Resetarits was speaking to on behalf of Bank of America, that that was as separate pull, so there might not be an additional burden. But if that is the case, then so be it, we will not -- don't want to duplicate or add to costs.

THE COURT: Mr. Temkin, I assume you can't answer that question on this call, can you?

MR. TEMKIN: Correct, your Honor, but we'll be happy to, you know, get back to counsel.

THE COURT: Right. So here's the way we're going to proceed. So, Mr. Temkin, to the extent you can get back to plaintiffs' counsel promptly on that question, you should please do so because, as I indicated, if plaintiff can get a separate data pull from you without any additional incremental costs and then you can do the, for lack of a better term, the

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broader data pull, then, you know, feel free to negotiate with the plaintiffs about doing that. But, otherwise, I'm going to proceed under the assumption that there's going to be one grand data pull from which this data is going to be culled.

And the parties are to meet and confer, like we did on this call, with all interested parties on the call and seek to resolve the scope, what I'll refer to as the scope issue, and report -- and advise the Court whether they've been able to come to agreement by -- does January 15 give you enough time?

(interposing - indiscernible)

MR. DELL'ANGELO: Well --

THE COURT: Mr. Dell'Angelo, it sounded like you wanted to say something.

MR. DELL'ANGELO: I did, your Honor. Thank you. And as I was speaking, I realized it's probably largely driven by the schedules of counsel for FXCM. What I was thinking is that we do have this preliminary approval hearing -- and I apologize, I can't remember if it's -- January 9. So I was thinking it would be helpful if we had a conclusion before that so we can report to Judge Schofield. But --

THE COURT: Well, counsel for FXCM, can you do it sooner?

MR. TEMKIN: No, your Honor. Well, what I mean,

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we'll be as expeditious as we can, but I don't think we can do it.

I'm going to be on vacation for actually ten days, not that I deserve it.

THE COURT: All right, and I'm going to wait to do the allocation. From what I heard, it sounds to me like -- and, obviously, FXCM should determine this -- it would seem to me that to get the address is just another field in addition to the state, where the customer was, and therefore, that the defendants should share in the expense of getting the location data, as well, unless there's incremental costs involved in getting the specific address as opposed to the state. That seems to me that it should be a shared cost.

So what the Court envisions here is there's going to be a certain amount that falls within the plaintiffs' subpoena, that is, trading data and location data and anything else that the plaintiff is getting that will insure to the benefit of the defendants, the defendants are going to share in that. If there's any plaintiffs-specific data or documents, the plaintiff will only share in that; and any defendants-specific documents or data, only the defendants will share in that. And that's what I want to hear back from the parties in a joint letter on January 15, how that plays out. If you all can work it out among yourselves, so be it.

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2 I mean by that, the plaintiffs and the defendants. And the
3 Court will come up with how much will be allocated between --
4 how much FXCM will pay and how much the parties requesting the
5 documents, the data will pay. And I am, as I think
6 Ms. Tesser -- I think it was Ms. Tesser contemplated -- there
7 will be no legal fees that will be allocated in any way for
8 resisting the subpoena, for objecting to the subpoena or
9 anything like that; rather, any attorneys' fees which will
10 have to be supported by contemporaneous billing records that
11 I'll review for reasonableness both in terms of number of
12 hours and hourly rates, unless the parties again can work it
13 out among themselves. It will only be for complying with the
14 subpoena. I think that's what the case law dictates.

15 MR. TEMKIN: Your Honor, this is Barry Temkin. May
16 I be heard on that point?

17 THE COURT: I'm not sure there's anything to be
18 heard on, but go ahead.

19 MR. TEMKIN: Thank you, your Honor. Your Honor, I
20 think that there is no such limitation that I've seen, either
21 in Rule 45 and in the case, and, you know, my firm has -- my
22 client's incurred significant expenses in avoiding bringing
23 this to the attention of the Court. And the plaintiff has
24 dropped, you know, many of his requests which we put in our
25 letter. And if we had made a motion to quash and perhaps got

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the plaintiff to drop half of their requests, I think under Rule 45 the Court would have awarded FXCM its attorneys' fees. Instead of burdening the Court with a motion to quash, what we did is we spent a lot of time and incurred a lot of expenses negotiating that they drop half their expenses. Your Honor, we've been on the phone with the defendants for an hour, and all we've been talking about is trading data. So it seems they've abandoned, you know, most of their other requests. So under these circumstances, I think FXCM, having complied with the Court's rules and met and conferred the way we're supposed to do, shouldn't have to pay more money for being good and complying with the Court's rules. If we had wanted a motion to quash or gotten an order from the Court modifying the subpoena to the extent we've agreed on today, I think you would have awarded us our attorneys' fees.

THE COURT: Are you and Ms. Tesser with the same law firm?

MR. TEMKIN: We are.

THE COURT: You're on the same side, right?

MR. TEMKIN: Affirmative.

THE COURT: Yes, so Ms. Tesser eloquently stated earlier why she believed the efforts that your firm undertook were in complying with the subpoena. And those type of efforts, to the extent I determined that they were in an

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2 effort to comply with the subpoena, I was saying would be
3 compensable. So I was agreeing with your colleague. And to
4 the extent you want to talk me out of that, I'm happy to hear
5 you further.

6 MR. TEMKIN: I think I agree with your Honor and
7 Ms. Tesser.

8 THE COURT: Okay. Is there anything else?

9 MR. TEMKIN: Your Honor, I have one more question --
10 yes, there's one more question I have. And I apologize to the
11 Court because counsel for Bank of America has explained this,
12 but I just want to make sure I understand it. So I apologize
13 for, you know, asking him to repeat himself. I just want to
14 understand -- and, again, my apologies -- the reasons why --
15 so I can explain to my client -- why the trading data for non-
16 defendant liquidity providers is essential to the defendants'
17 case.

18 MR. RESETARITS: Again, the plaintiffs' allegations
19 in this case are that the defendants colluded with each other
20 and impacted the price of FX rates. The way that the Retail
21 Foreign Exchange Markets works is the retail trader trades
22 with an entity like FXCM. The allegation is that FXCM then
23 does as back-to-back trade with a liquidity provider. If, for
24 example, FXCM did a back-to-back trade with a non-defendant,
25 there's at least one argument -- there's likely many

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arguments -- as to why that particular retail customer could not have been injured by the defendants.

There's also additional issues, which I'm sure you're aware of, where a retail foreign exchange individual trades with FXCM and FXCM does not do a back-to-back trade because, for example, the size of the trade from the retail customer is so small, that they can't go into the interbank market and trade a \$500 or a \$1,000 trade with an entity like the defendant banks because it's too small. So what FXCM and other entities like it do is they warehouse it until it builds to a particular size and then they trade with a liquidity provider that could be a defendant or a non-defendant. And in that situation it's not a back-to-back trade, and any prices they received were not passed onto the retail customer.

So I could go on and on. There's a whole host of reasons why the full complement of FX trading data from your client is important to our defense.

THE COURT: And this is Judge Aaron. This is the type of conversation that I am ordering you to have with one another. And I've been on the phone now for, I guess, a little over an hour, but I don't need to be part of it. This is the type of conversation I want you to have with one another to try to work this out. And, by the way, having heard what I heard, the Court has no doubt that the trading

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2 data the defendant is seeking is relevant to this
3 controversy. It is something that needs to be produced. It's
4 another question as to who's going to pay for it and in what
5 shares. That's going to be something I'll determine. But
6 this is data that's relevant to the defense of the case.

7 Anything else the parties would like to raise?

8 I'm sorry, I didn't --

9 MR. DELL'ANGELO: Nothing for the plaintiffs, your
10 Honor. Thank you.

11 THE COURT: Okay. Anything else from FXCM?

12 MR. TEMKIN: Yes, your Honor, Barry Temkin. I just
13 want it clear that counsel for the defendants
14 was -- accidentally, inadvertently left out from their initial
15 letter to the Court that we did have an agreement that was
16 confirmed in writing that we had an extension of time in which
17 to file objections or move. I think counsel inadvertently
18 omitted that from their initial submission to the Court. And
19 I just want that clear as your Honor read the records.

20 MS. WEBB: I'm happy to respond to that, if you'd
21 like.

22 THE COURT: Okay.

23 MS. WEBB: I will say that I was unaware of that
24 email at the time we filed our letter. And so I apologize for
25 not including it. I also do not believe that we ever agreed

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to an infinite extension of time. But it seems a moot point at this point. We're willing to work with FXCM and figure out what is appropriate to be produced based on burden.

THE COURT: Yes. And the draft opinion that I prepared that I will not be issuing today has in a footnote that I do not find there's been a waiver of FXCM's objection. And that will -- that footnote will carry over to whatever I ultimately issue. There's been no waiver in the circumstances and on the record before me.

All right --

MS. WEBB: Sounds good, your Honor.

THE COURT: All right, so by January 15 I expect to see a joint letter hopefully that all of you have worked out the scope issues and advising the Court as to -- and this will be in the written order that my law clerk and I will work on -- but trying to get across the point of, you know, how much is for the plaintiffs' benefit only, how much is overlap and how much is for the defendants' benefit only. And in that way I can properly allocate the burden here.

All right, with that, this matter is adjourned. And, as I said, expect to see an order probably sometime this afternoon, if not tomorrow morning.

MR. TEMKIN: Thank you, your Honor.

THE COURT: All right, very well. This matter is

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adjourned. Thank you.

(Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Contant et al v. Bank of America Corporation et al, Docket #17-cv-03139-LGS-SDA, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Date: March 5, 2020